IN THE

Supreme Court of the United States

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No. 76 - 1171

JAMES Y. CARTER, Public Vehicle License Commissioner of the City of Chicago,

Petitioner,

vs.

LUTHER MILLER, on his own behalf and on behalf of all others similarly situated,

Respondent.

On Writ Of Certiorari To the United States Court of Appeals For the Seventh Circuit

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BRIEF OF SAN FRANCISCO LAWYERS' COMMITTEE FOR URBAN AFFAIRS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1/]

Statutory requirements for a license as a condition of employment are widespread in the United States. In California, for example, more than 178 vocations require a license. They include even such occupations as barbering[2/] and dry cleaning.[3/] Vocational licensing statutes pose a common obstacle to employment of persons with criminal convictions, because many of the statutes restrict the issuance of licenses to such ex-offenders. These restrictions constitute a particular frustration to those offenders who are trained for licensed vocations in prison rehabilitation programs.

The San Francisco Lawyers' Committee For Urban Affairs ("The Committee") is an organization of lawyers practicing in the City and County of San Francisco whose goal is to provide legal services to the urban community. In early 1973 the Committee enlisted several lawyers in the firm of Orrick, Herrington, Rowley & Sutcliffe in a *pro bono publico* project designed to give legal services to persons who were having difficulties obtaining vocational licenses because of previous criminal

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1/ Letters from counsel for the parties to this action consenting to the filing of this brief *amicus curiae*, have been filed with the Clerk of the Court pursuant to the U.S. Supreme Court Rule 42(2).

2/ CAL. BUS. & PROF. CODE §§6545, et seq.

3/ CAL. BUS. & PROF. CODE §§9500, et seq.

convictions. The object of the program, in part, is to aid ex-offenders in overcoming barriers to obtaining meaningful employment.

Since the project began four years ago, lawyers from Orrick, Herrington, Rowley & Sutcliffe have counseled over twenty-five individual ex-offenders seeking licenses in more than a dozen licensed vocations. The extensive practical experience gained during those years, expecially in administrative fitness proceedings, gives the Committee a particular knowledge of administrative practice in the vocational licensing area and of the invalidity of arguments raised by Petitioner, the City of Chicago, in its brief.

PRELIMINARY STATEMENT

Chapter 28.1-3 of the Municipal Code of the City of Chicago bars any applicant who has ever been convicted of certain felonies from ever obtaining a license as a taxi driver. Although the Code provides for a hearing for all persons whose applications are denied, [4/] the right to a hearing given to ex-offender applicants is meaningless, because denial of licenses to ex-felons is mandatory without regard to their present fitness.

The same Code also provides that a licensee convicted of any of the same crimes is entitled to a meaningful hearing as to his present fitness before his

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4/ Chicago Mun. Code, Chapter 28.1-10.

license can be revoked; that is, he may be successful by means of the hearing in retaining his license.[5/]

The court below held that the discrimination between licensees and applicants denied equal protection to those ex-offenders who had not previously held licenses. The Committee submits this brief because Petitioner's scheme denies equal protection to ex-offender applicants in denying them, unlike other applicants, a genuine opportunity to demonstrate their fitness for a license, and because and in light of its experience, the arguments by Petitioner to justify this statutorily created discrimination are groundless.

ARGUMENT

I. THE CHALLENGED STATUTORY SCHEME DENIES EQUAL PROTECTION TO EX-OFFENDERS IN THAT IT UNJUSTIFIABLY DISCRIMINATES AGAINST THEM.

The challenged statutory scheme here clearly discriminates against persons with certain felony convictions who are seeking licenses as cab drivers in favor of applicants without such convictions. A conviction perforce prevents an applicant from obtaining a license, without any opportunity to display his current fitness. Those who do not have a conviction, on the other hand, are entitled to a hearing to determine their present fitness.

5/ Ibid.

The question is whether there is sufficient justification for this scheme such that the discrimination is not violative of the Equal Protection Clause.

Petitioner has asserted in its brief that in enacting this discriminatory scheme the City was attempting to meet its responsibility to protect the public from criminal actions by taxicab operators.[6/] As justification Petitioner, without any supporting evidence, asserts:

> The rationality of an *inference* of unfitness for cab driving based upon the commission of an armed felony *cannot be questioned*. [Brief of Petitioner, p. 9] [Emphasis added.]

To Petitioner, such "inference" is sufficient to justify discrimination against a class of persons which effectively bars them from a vocation for life.

As may be seen below, the Committee's experience shows not only that this conclusive "inference" is disputable but also that it is often, indeed the Committee's results show, nearly always unwarranted.

6/ Brief of Petitioner, p. 8. Whether this is actually the purpose of the statute is questionable. As in *Craig v. Boren*, ____ U.S. ____, S.Ct. 451, 50 L.Ed. 2d. 397, *reh. den.* 97 S.Ct. 1161 (1977), it is not self evident on the face of the statute and Petitioner has cited no statutory history identifying this as the purpose. Whether the purpose claimed by Petitioner is indeed the true purpose behind the statute is especially suspect in this as in any case of vocational licensing restrictions. *See*, discussion, *infra*, at p. 14.

Therefore, because the discrimination does not bear the necessary relationship to the purported object of the legislation, Petitioner's scheme violates the Equal Protection Clause of the Constitution of the United States.

II. THE JUSTIFICATION FOR THE DISCRIMINATORY STATUTORY SCHEME HERE IS REFUTED BY THE COMMITTEE'S EXPERIENCE

The Committee's experience shows that, during the administrative process ex-offenders more often than not do actually convince agencies of their present fitness. Specifically, of the eighteen (18) ex-offenders the Committee has represented in formal proceedings with agencies, seventeen (17) are now licensed. All of these ex-offenders made their criminal records known to the agency in their application.

These results attest to the irrationality of the lifetime conclusive inference that all ex-offenders are unfit to practice the vocation of driving a cab. In the Committee's experience ex-offender applicants have time and again proved to licensing agencies their present fitness to be licensed despite acknowledged criminal convictions as serious as first degree murder. The agencies have been satisfied with the present fitness of the ex-offenders after, in some cases, informal meetings with the ex-offender applicants and in others, after formal administrative hearings.

The plain fact is that, regardless of their past criminal records, ex-offenders may now be rehabilitated

and fit to be licensed; and a meaningful hearing will give them the chance to prove that fitness. Indeed, by statute in California vocational agencies regulated by the Business & Professions Code may not deny licenses to ex-offender applicants unless the ex-offender's conviction was "substantially related to the qualifications, functions or duties of the business or profession for which application is made" [7/] and the agency finds the applicant is not rehabilitated. [8/]

The fact that seventeen of the eighteen ex-offender applicants are now licensed shows that the inference upon which the City relies above not only can be questioned, but that it is rarely sound. The statutory scheme in question here is so vastly over-inclusive as to be irrational and certainly is not sufficiently related to the achievement of what Petitioner claims to be its objective. The scheme contradicts its stated premise by giving licensed taxicab drivers who are convicted as felons the meaningful hearing that is denied to applicants. If there is any validity to drawing an inference of unfitness from the fact that an applicant has a felony conviction, and the Committee's experience shows that there is not, the inference would also have to apply to those who have

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7/ CAL. BUS. & PROF. CODE §480 (West).

8/ CAL. BUS. & PROF. CODE §482 (West).

committed a felony while licensed. As the Court of Appeals cogently noted in this case:

> In fact, allowing existing licensees who commit felonies to continue to be eligible for licensing undercuts the reasonableness of the basis for the classification, which is that the felony is *per se* likely to create a serious risk which cannot be sufficiently evaluated to protect the public through individualized hearings. *Miller v. Carter*, 547 F.2d 1314, 1316 (7th Cir. 1977).

This contradiction of the validity of the conclusive "inference" of unfitness because of a felony conviction is itself the best evidence that discrimination between those with a prior conviction and those without does not closely serve to achieve the purported objective of the statute. [9/]

9/ In basing its defense of the scheme on the conclusiveness of this "inference", petitioner also falls prey to another Constitutional infirmity by creating an invalid "irrebuttable presumption." *See*, Judge Campbell's opinion concurring with the Court of Appeals decision in this case, 547 F.2d at 1319, and cases discussed therein.

If the irrebuttable presumption doctrine is applicable to any fact situations beyond those to which it has already been applied, then it should be applied here where the presumption has been so often rebutted when the ex-offender is given a fair, individualized hearing. *See, Vlandis v. Kline*, 412 U.S. 441 (1973), where in finding constitutionally invalid an irrebuttable presumption that a student residing outside of a state when applying to a university

III. THE HEARING PROCESS IS A PROVEN WAY TO MAKE MEANINGFUL DETERMINATIONS WHICH DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

The City attempts to justify the obvious irrationality of giving a hearing to ex-felon licensees but not to ex-felon applicants by claiming that the hearing process is more valid for licensees than for applicants because they have a "track record" while an applicant has none. The fact is, however, that an applicant may have just as lengthy a track record driving a taxicab in another jurisdiction or in another related vocation, such as driving a bus. It is also possible that a licensee may have little or no track record at all; that is, a licensee may be convicted before he has had any employment, or at least any

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would remain an out-of-state resident so long as he was a student, this Court Said:

> The State's interest in administrative ease and certainty cannot, in and of itself, save the conslusive presumption from invalidity under the Due Process Clause when there are other reasonable and practicable means of establishing the pertinent facts on which the State's objective is premised. In the situation before us, reasonable alternative means for determining bona fide residence are available. 412 U.S. at 451.

As in *Vlandis*, there is certainly a reasonable alternative means available here for making individualized determinations: administrative fitness hearings.

significant employment as a taxicab driver. *See Miller v. Carter*, 547 F.2d 1314, 1316 (7th Cir. 1977).

More fundamentally, in the experience of the Committee, licensing agencies and administrative law judges have had no difficulty acting on just the type of evidence (probation reports, dissimilar employment experiences, and psychological evaluations) which Petitioner claims is useless to make a valid judgment that the ex-offender applicant is fit to be licensed.[10/]

The central issue in the administrative hearings in which the Committee's attorneys have participated has been rehabilitation. Applicants have produced evidence of activities in and after prison, probation and parole reports, and psychological evaluations. In addition, factors such as the age of the offender at the time of the offense and the length of time since the conviction have been found relevant. Applicants have also offered testimony of family, friends, parole officers, and other licensees in the vocation involved.

Licensed professionals who have personal acquaintance with ex-offender applicants have been pertinent witnesses in administrative hearings because of their expert opinion that the ex-offender in question is fit to be licensed. In many of the cases in which the Committee's attorneys have participated, these profes-

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10/ Brief of Petitioner, p. 13.

sionals have testified about their work experience with the ex-offenders in vocation-related jobs. [11] Often these jobs were obtained by the ex-offenders in conjunction with early parole from prison. The professionals have testified to their shock on learning that ex-offenders, who have proved themselves fit for early release and who have then performed creditably in a job leading up to the licensed vocation, are threatened with having their vocational aspirations shattered by denial of license based solely on prior convictions for which the ex-offenders have already been punished.

Parole officers who have appeared as witnesses on behalf of ex-offender applicants at hearings in which the Committee has participated have also testified not only as to the rehabilitation and fitness of the ex-offenders, but also as to the importance of meaningful employment for the ex-offender in his long-range reintegration into society.[12] None of this readily available and

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[11] For instance, applicants trained in prison as vocational nurses have on their release worked as hospital orderlies and nursing assistants.

[12] The *Task Force Report: Corrections* (1967), of the President's Commission of Law Enforcement and Administration of Justice has also condemned the irrationality of occupational licensing restrictions as undermining a meaningful corrections system, because "unemployment may be among the principal causal factors in recidivism of adult male offenders." The Report

important evidence can be considered or even come to light in the scheme Petitioner seeks to defend.

In the Committee's experience the administrative law judges who have presided at hearings and the agencies themselves have shown no reluctance at all to act on just such evidence. In short, the proof of fitness which ex-offender applicants have produced at these hearings, both formal and informal, has been both reliable and convincing to the agencies.

The effectiveness of applicant hearings distinguishes the proper decision in this case from *Weinberger* v. *Salfi*, 422 U.S. 749 (1975). In *Salfi* the Court held that wage earners' widows and step-children had no right to an individualized hearing to determine whether their relationship to the wage earner was legitimate even though it had begun less than nine months before his death. The Court was not convinced that hearings would be effective. The present case is entirely different. As the Committee's experience shows, individual determinations can

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recognized that:

> "... licensing laws usually do not confine restrictions to situations in which there is a rational connection between an offense and the practice of an occupation. Licenses are in many cases primarily revenue measures or else products of pressure by unions or trade associations to limit access to an occupation." Id. at 33.

effectively uncover those unfit to drive a cab, for fitness is reliably determinable by the licensing agency. For the same reasons, the effectiveness of applicant hearings also distinguishes this case from *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976).

The persuasiveness of the evidence which ex-offenders have produced at these hearings is shown most clearly when one recognizes that in California the burden of proving rehabilitation at the administrative level is entirely upon the ex-offender. Once a criminal conviction has been established, it is entirely up to the applicant to prove rehabilitation. The success of the ex-offenders in administrative proceedings is therefore doubly revealing of the probity of the evidence on which agencies have awarded licenses to ex-offenders.

Since Petitioner already has the administrative machinery to have hearings for licensees with felony convictions, of course there can be no argument that its scheme is based on administrative convenience. As the Court stated in *Stanley v. Illinois*, 405 U.S. 645, (1972), in holding unconstitutional a statute that denied an unwed father an opportunity to prove that he was a fit parent:

> The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. *But the Constitution recognizes higher values than speed and efficiency.* 405 U.S. at 656 [Emphasis added.]

IV. PETITIONER'S CLAIMED BASIS FOR ITS DISCRIMINATION IS IMPEACHED BY THE LIKELY ACTUAL PURPOSE OF ITS STATUTORY SCHEME: TO PROTECT THOSE ALREADY LICENSED BY RESTRICTING ENTRY TO THE VOCATION.

That the arguments offered by Petitioner to justify its discriminatory scheme sound hollow, or that Petitioner offers no evidence to support its claimed legislative purpose should not be surprising. It is well known among expert commentators that the true reason for such restrictions is to protect those already licensed. As professor Walter Gellhorn recently wrote:

> That restricting access is the real purpose, and not merely a side effect, of many if not most successful campaigns to institute licensing schemes can scarcely be doubted. Licensing, imposed ostensibly to protect the public, almost always impedes only those who desire to enter the occupation or "profession," those already in practice remain entrenched without a demonstration of fitness or probity.[13/]

13/ Gellhorn, *The Abuse of Occupational Licensing*, 44 U. Chi. L. Rev. 6 at 11 (1976). *See also*, Moore, *The Purpose Licensing*, 4 J. Law & Econ. 93 (1961); Wallace, *Occupational Licensing and Certification: Remedies for Denial*, 14 Wm. & Mary L. Rev. 46, 47 - 49 (1972); Note, *Occupational Licensing: An Argument for Asserting State Control*, 44 Notre Dame L. Rev. 104, 109 (1968); Barron, *Business and Professional Licensing - California, A Representative Example*, 18 Stan. L. Rev. 640 (1966); Gellhorn, *Individual Freedom and Governmental Restraints*, 105 - 51 (1956).

More specifically, the President's Commission on Law Enforcement has identified the interest of licensee groups in restrictions based on criminal records as follows:

> Such groups tend to be primarily concerned with advancing the interest of their own members. Thus, when faced with the problem of whether to license persons with criminal records, they may be unduly concerned with the effect on the status of their professions. Further, to the extent they try to consider the public interest, they are likely to have an unrealistic view of the importance of their own profession or occupation and the potential harm to the public that might be done by unfit persons. They tend to give inadequate weight to the interests of the convicted persons, and to those of society as a whole in having the contributions of this person and in not forcing him back into a life of crime.[14/]

The scheme here is more obvious than most in attempting to restrict membership to the vocation: it gives those already entrenched a hearing in which to prove their present fitness even though they may have committed certain felonies, while denying this basic fairness to ex-offenders outside the profession.

14/ President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections* (1967), at 91.

If the true purpose behind Petitioner's arrangement is recognized, there need be no concern that a finding that the scheme is unconstitutional will result in an amendment of the ordinance to the detriment of licensees.[15/] It is highly unlikely that current licensees, who presumably were a potent legislative lobby supporting the restriction in the first place, will permit a legislature to limit their own right to a revocation hearing. In addition the agencies themselves are likely to resist such a limitation, because they have shown a desire to maintain much discretion in licensing as possible. For instance, in one case in which the Committee has participated both the agency and the reviewing trial court upheld the denial of a license to an ex-offender. When an appeal was threatened, the agency granted the desired license to the ex-offender in exchange for an agreement not to prosecute an appeal from its previous denial. This capitulation can be best explained as reflecting the agency's desire not to have its denial tested on appeal lest an adverse decision limit the agency's administrative discretion. At any rate, a law which denied a licensee a hearing before his license

15/ This was a concern of Judge Campbell, who agreed with the majority below that the scheme in question is an irrational denial of equal protection, but feared that the deficiency would be remedied by "amending the ordinance so as to provide for the automatic revocation of any license held by a person who, subsequent to issuance thereof, is convicted of certain felony offenses." 547 F.2d at 1319 - 20.

could be revoked would arguably violate the Due Process Clause of the Constitution. 16/

16/ The irrational conclusive inference that felony convictions mean occupational unfitness for life also denies due process to ex-offender applicants just as much as it would licensees. Due process clearly applies to occupational licensing, for the Court has said that " any qualification must have a rational connection with the applicant's fitness or capacity to practice" the vocation. *Schware* v. *Board of Bar Examiners of the State of New Mexico*, 353 U.S. 232, 239 (1957). While *Schware* dealt with arrests rather than convictions, the Committee's experience shows that there is no more rational relation between felony convictions and taxi driver vocational fitness than there was between arrests and capacity to practice law in *Schware*.

DeVeau v. *Braisted* 363 U.S. 144 (1960), cited by petitioner, is not to the contrary. In *DeVeau* this court upheld an act which provided that ex-felons could not work as port watchmen. The case was superficially similar to this one, but a closer look reveals a crucial difference. The Court based its decision on the fact that:

> New York was not guessing or indulging in airy assumptions that convicted felons constituted a deleterious influence on the waterfront. It was acting on *impressive* if mortifying *evidence* that the presence on the waterfront of ex-convicts was an important contributing factor to the corrupt waterfront situation. (363 U.S. 144 at 159-60). [Emphasis added].

The City of Chicago cites no evidence that ex-felons are unfit to drive taxis. Quite the opposite, the Committee's experience demonstrates that, given a hearing, many ex-offender applicants could likely prove their fitness.

CONCLUSION

For the reasons stated it is respectfully submitted that the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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August, 1977